Lim Boon Chuan @ Lim Ban Huat v Wonderful Castle Sdn Bhd (in liquidation) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-2016–11 OF 2016
NALLINI PATHMANATHAN, YAACOB MD SAM AND RHODZARIAH BUJANG JJCA
23 APRIL 2018

Companies and Corporations — Winding up — Liquidator — Application to remove liquidator — Allegation that liquidator failed to ascertain true market value of land and secure fair market price for land — Land purchased by majority shareholder — Whether liquidator acted in contravention and/or in breach of statutory and fiduciary duties — Whether there was collusion between liquidator and majority shareholder/purchaser — Whether liquidator ought to be removed — Companies Act 1965 s 137

The appellant, a minority shareholder of the first respondent, had petitioned for the winding up of the first respondent on the ground that cash advances in the sum of RM5,327,167.09 made by him to the company were not re-paid and the statutory notice issued under s 218 of the Companies Act 1965 ('the Act') was not met. The liquidator of the first respondent advertised for the sale of the company's lands. The market value of the land was RM60m and it was awarded to the second respondent for RM132m. At the High Court, the appellant sought the removal of the liquidator under s 137 of the Act on the grounds that the liquidator had acted in collusion with the second respondent through the majority shareholder and managing director ('TPS') to effect the sale of the land and this was in contravention and/or in breach of his statutory and fiduciary duties. The appellant also sought to set aside the sale and purchase agreement for the sale of the said land. The liquidator argued that: (a) the sale had been effected with full disclosure and the highest bid was accepted with the knowledge and consent of the creditors and contributories; and (b) the sale price was not an undervalue and therefore, there was no possibility of collusion as the first respondent did not suffer any loss by reason of the sale. The High Court dismissed the appellant's application. Hence, the present appeal. The issue that arose was whether there was sufficient basis for the removal of the liquidator.

Held, dismissing appeal:

(1) As the majority shareholder and director of the second respondent, TPS would be acquiring the most substantial and valuable asset of the company. There was sufficient disclosure of TPS's interests and the price

at which the acquisition was made was a reflection of the fair market value. TPS had annexed to the bid, under the second respondent, a statutory declaration disclosing his interest. There was no authority prohibiting a contributory and a creditor from bidding in such a tender exercise provided there was a full disclosure. Therefore, it could not be said that the transaction was undertaken at less than an arm length's basis (see para 29).

(2) The sum of the sale price, which was RM32m, could not be categorically stated to be an undervalue or far below the fair market price for the lands. An independent valuation valued the land at RM60m. A second report valued the land as the same. It was not unreasonable for the liquidator to have utilised this report as guide for the valuation of the land. The price at which the lands were transacted afforded a reasonable price. The contention of a sale at an undervalue therefore failed. There was insufficient basis to warrant the removal of the liquidator (see paras 30–31).

[Bahasa Malaysia summary

Perayu, pemegang saham minoriti responden pertama, telah membuat petisyen untuk menggulung responden pertama atas alasan wang pendahuluan berjumlah RM5,327,167.09, yang diberi olehnya kepada syarikat, tidak dibayar balik dan notis statutori yang dikeluarkan di bawah s 218 Akta Syarikat 1965 ('Akta') tidak dipenuhi. Pelikuidasi responden pertama mengiklankan jualan tanah syarikat tersebut. Nilai pasaran tanah ini adalah RM60 juta dan tanah diawardkan kepada responden kedua pada harga RM132 juta. Di Mahkamah Tinggi, perayu memohon penyingkiran pelikuidasi di bawah s 137 Akta atas alasan pelikuidasi berpakat secara sulit dengan responden kedua, melalui pemegang saham majoriti dan pengarah urusan ('TPS'), untuk melaksanakan jualan tanah dan ini bertentangan dan/atau melanggar tugas-tugas statutori dan fidusiarinya. Perayu juga memohon untuk mengetepikan perjanjian jual beli jualan tanah tersebut. Pelikuidasi menghujahkan: (a) jualan dilaksanakan melalui pendedahan penuh dan tawaran tertinggi diterima dengan pengetahuan dan persetujuan pemiutang dan pencarum; dan (b) harga jualan bukan di bawah nilai dan oleh itu, tidak mungkin berlaku pakatan sulit kerana responden pertama tidak mengalami kerugian akibat jualan tersebut. Mahkamah Tinggi menolak permohonan perayu. Oleh itu, rayuan ini. Isu yang timbul adalah sama ada terdapat asas yang cukup untuk menyingkirkan pelikuidasi.

Diputuskan, menolak rayuan:

(1) Sebagai pemegang saham majoriti dan pengarah responden kedua, TPS akan memperoleh aset yang paling besar dan bernilai bagi syarikat itu. Terdapat pendedahan yang mencukupi tentang kepentingan TPS dan harga di mana pengambilalihan dibuat mencerminkan nilai pasaran

saksama. TPS telah melampirkan pada bidaan tersebut, bawah responden kedua, satu akuan berkanun yang mendedahkan kepentingannya. Tiada nas yang melarang pencarum dan pemiutang daripada membida dalam apa-apa langkah tender asalkan terdapat pendedahan penuh. Oleh itu, tidak boleh dikatakan bahawa urus niaga tersebut adalah berasaskan kepentingan diri sendiri (lihat perenggan 29).

(2) Jumlah harga jualan, iaitu RM32 juta, tidak boleh dikategorikan sebagai di bawah nilai atau jauh bawah harga pasaran saksama bagi tanah. Penilaian bebas menilai tanah pada RM60 juta. Laporan kedua menilai tanah dengan nilai sama. Bukan tidak munasabah bagi pelikuidasi untuk menggunakan laporan ini sebagai panduan untuk menilai tanah tersebut. Harga pada mana tanah diurusniagakan menghasilkan harga berpatutan. Oleh itu, hujahan jualan di bawah nilai gagal. Tiada asas yang cukup untuk mewajarkan penyingkiran pelikuidasi (lihat perenggan 30–31).]

Notes

For cases on liquidators, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1645–1709.

Cases referred to

Abric Project Management & Anor v Palmshine Plaza Sdn Bhd & Anor [2007] 5 MLJ 685, HC (refd)

North Plaza Sdn Bhd v Equiticorp Holdings Ltd and other appeals [2013] 3 MLJ 617; [2013] 3 CLJ 1101, FC (refd)

Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd) [2010] 2 MLJ 749; [2010] 3 CLJ 785, FC (refd)

Legislation referred to

Companies Act 1965 ss 137, 218, 227, 233, 236(2)(c), (3), 241, 242
Companies Winding-Up Rules 1972 r 106

Appeal from: Winding Up Petition No 28NCC-177–04 of 2015 (High Court, Shah Alam)

M Pathmanathan (Kalearasu Veloo with him) (SF Chan & Co) for the appellant.
Gopal Sri Ram (Kirubakaran, David Yee and Kevin Cheong with him) (The Chambers of Cheong) for the first respondents.
Eric Tan (Cynthia Liaw with him) (Ong Kok Bin & Co) for the second respondents.

Nallini Pathmanathan JCA:

[1] These are our brief grounds of judgment in respect of this appeal. Vide this appeal the appellant, Lim Boon Chuan @ Lim Ban Huat ('the appellant'),

A seeks to remove the very liquidator that he proposed for appointment, in Companies Winding Up Petition No 28 NCC-177/04 of 2015. The appellant was the petitioner in that winding up.

B **[2]** In the High Court the appellant sought the removal of Dato' Tee Guan Pian ('the liquidator') under s 137 of the Companies Act 1965 and the substitution of one Duar Tuan Kiat as liquidator. More importantly, the petitioner also sought the setting aside of a sale and purchase agreement dated 13 November 2015 entered into between the liquidator on behalf of the company as vendor and one Steady Developments Sdn Bhd as purchaser in C respect of three titles, namely GRN 46990, GRN 47648 and GRN 47993 comprising five parcels of land amounting to 852.6 acres. The basis for such removal were the allegations that: (i) the liquidator had acted in contravention and/or in breach of his statutory and fiduciary duties; (ii) had acted D unreasonably in failing to ascertain the true market value of the land; and consequently; and (iii) had failed to secure a fair market price for the subject lands.

[3] The appellant also sought to contend that the liquidator had acted in E collusion with the purchaser through Tan Peng Son ('TPS') to effect this sale to Steady Developments, the second respondent.

[4] For the liquidator, it was argued in rebuttal that the sale had been effected F with full disclosure, that the highest bid was accepted, that too with the knowledge and consent of the creditors and contributories, and that the sale price was not at an undervalue premised on a contemporaneous and independent valuation undertaken. Therefore no possibility of collusion arose and the company had not suffered any loss by reason of the sale.

G THE FACTUAL MATRIX-CHRONOLOGY OF EVENTS

[5] The appellant is a minority shareholder, out of five other such shareholders who collectively hold 42.5% of the shares of the first respondent H company. One other minority shareholder was Emiprima Sdn Bhd ('Emiprima').

[6] The six majority shareholders holding collectively 57.5% of the shares in the company are:

I (a) Tan Peng Son (17.5%);

(b) Chng Kiam Huat (20%); and

(c) Tan Eng Soi (2.5%)

[7] Tan Peng Son was the managing director. The appellant and one Lim Mei Hsia were amongst the other 12 directors of the company. A

[8] The appellant petitioned for the winding up of the company on the ground that cash advances totalling RM5,327,167.09 made by him to the company were not re-paid and the statutory notice issued under s 218 of the Companies Act 1965 ('the Act') was not met. The winding up order was made on 14 August 2015 and one Tee Guan Pian was appointed the first respondent's liquidator. As stated at the outset, the liquidator was the appointee of choice of the appellant. B C

[9] (a) About three weeks after his appointment, that is on 7 September 2015, the liquidator advertised for the sale of the company's three parcels of land in two local publications namely *The Star* and *Sin Chew Jit Poh*. The land was planted with oil palm trees and also built on the lands were an estate manager's bungalow, estate office, workers' quarters and a store. Machineries, equipment and office furniture were also kept on the land. The deadline for submission of the tender was on 28 September 2015; D

(b) on 28 September 2015, Emiprima wrote to the liquidator informing him that an adjacent land was transacted at RM250,000 per acre (see Tab 22 of the core bundle of documents, Vol 2). E

A statutory declaration of Tan Eng Soi affirmed on 28 September 2015 (at pp 1231–1232 of Vol 3/4 of the appeal records) stating that the directors of first and second respondents are the same persons, was attached to the tender of the second respondent and submitted on the same day, ie the last day for submission of the tender. In other words, the directors of the company in liquidation and the prospective purchaser was the same persons; and F G

(c) on 1 October 2015, an informal meeting was held by the liquidator which was attended by the Appellant, Lim Mei Hsia, Tan Peng Son, Tang Eng Lor and Ching Kiam Huat, amongst others (see Tab 35 of the core bundle of documents, Vol 2). The minutes of meeting disclose, inter alia, follows: H

(i) the liquidator informed the meeting that he received six bids, the highest being RM131m submitted by one Fuji Trax Sdn Bhd;

(ii) Tan Peng Son offered to buy the land at RM132m. The last page of the minutes of meeting record that there were no objections by other contributors on the revised offer by Tan Peng Son. However the liquidator could not make a decision at that juncture due to the non-availability of the statement of affairs, which the board of directors had yet to submit to him; I

(iii) the appellant however alleged that he was verbally abused and threatened with physical harm by Tan Peng Son at the meeting when he raised objections about the sale; and

(iv) the valuation report dated 7 October 2015 from MacReal International Sdn Bhd (at pp 634–671 of the appeal record, Vol 2/4) stated that the market value of the land is RM60m. An earlier report dated 25 March 2015 from the same valuer who was appointed by OCBC Bank (enclosed at pp 830–868 of the appeal records, Vol 3/4) recorded the same market value.

[10] On 12 October 2015 the liquidator awarded the land to the second respondent, Steady Developments Sdn Bhd for RM132m (see Tab 35 of the core bundle Vol 2/4 — minutes of meeting dated 31 March 2016).

[11] On 16 October 2015 the statement of affairs was submitted to the liquidator.

[12] The letter dated 27 October 2015 from the appellant's solicitor requested for an update on the sale of the land (enclosed at p 701 of the appeal records, Vol 2/4, Part C).

[13] The appellant's solicitors' letter dated 5 November 2015 requested further information about the buyer, which was disclosed by the liquidator during the informal meeting (see tab 8 of the core bundle, Vol 1).

[14] The appellant's solicitors' letter dated 13 November 2015 requested that the sale be expeditiously concluded and that no extension of time was to be given for payment (see tab 8 of the core bundle, Vol 1).

[15] On 13 November 2015 a sale and purchase agreement was executed with Steady Developments Sdn Bhd and the RM13.2m deposit was collected by liquidator. Among the terms of the sale and purchase agreement were that:

(a) the consent to transfer from the estate board was to be submitted by the vendor; and

(b) the lawyer for the liquidator was to apply to remove the caveat and discharge the charge lodged by OCBC Bank over the lands.

[16] On 18 November 2015 the appellant's solicitors were informed of the sale and purchase agreement with Steady Developments Sdn Bhd.

[17] On 30 December 2015 the stamped copy of the sale and purchase agreement was forwarded to the appellant.

[18] On 28 January 2016, the charge was discharged. A

[19] On 8 March 2016, the private caveat was removed.

[20] On 11 March 2016 the application for consent to the estate board was made. However, the application to the estate board was rejected vide letter dated 18 October 2016 (see Tab 38 of core bundle, Vol 2, a letter from the Chambers of Cheong). B

[21] At the creditors meeting of the first respondent company held on 31 March 2016, Ernest Cheong acted as the appellant's proxy. C

[22] On 25 April 2016, Ernest Cheong provided a valuation of RM210m (at pp 465–567 of the appeal records Vol 2/4). D

[23] On 4 May 2016 the notice of motion to remove the liquidator was filed.

[24] It is to be noted that on 9 June 2015 the appellant's solicitors' sent an email which forwarded the draft sale of shares agreement (for appellant to sell all his shares in the first respondent to Ching Kiam Huat, the other majority shareholder), and in that email the value of the land is stated as RM61,727,802 (at p 878 of the appeal records, Vol 3/4). E

ISSUES IN THE APPEAL F

[25] In considering whether there was sufficient basis for the removal of the liquidator, the following issues arose for consideration in this appeal:

(a) whether the liquidator in the conduct of the liquidation namely the sale of the subject lands, acted in contravention of various sections of the Companies Act 1965? G

(b) whether the sale was undertaken at an undervalue?

(c) whether the sale was effected in the best interests of the company? and H

(d) whether there was collusion between the creditor and majority shareholder/contributory of both the company, and Steady Developments Sdn Bhd, namely Tan Peng Soon and the liquidator?

Issue (a): Whether the liquidator in the conduct of the liquidation, namely the sale of the subject land, acted in contravention of various sections of the Act? I

[26] In summary it was contended by learned counsel for the appellant that there were several breaches of the Act in relation to the conduct of the

liquidation. These breaches included the following matters:

(a) that the liquidator did not call for a formal creditors' meeting to get their consent or that of the creditors within 21 days from the date of the winding up in contravention of r 106 of the Companies Winding-Up Rules 1972. However a perusal of the two provisions namely r 106 and s 227 discloses that this first meeting of creditors and contributories is necessary in order to determine whether the liquidation is to be undertaken by the official receiver or a liquidator. In the instant case, the liquidator was appointed on winding up so there was no necessity for such a meeting to be convened. There is therefore no breach of r 106 or s 227 of the Act;

(b) that the liquidator did not form a committee of inspection thereby contravening ss 241 and 242 of the Act. However a perusal of those sections discloses that a committee of inspection ('COI') is only formed if the creditors or members request the same. Generally such a COI is necessary where there are a large number of creditors and the numbers are too unwieldy to warrant attendance by all creditors on each occasion. In the instant case there was no request, so there was no necessity to form a COI. It is not a mandatory requirement and therefore there is again, no breach of ss 241 and 242 of the Act;

(c) it was contended that there was a failure to procure an order of court to vest the subject lands in the liquidator and that this too amounted to a breach of s 233. However s 233 does not make it mandatory that the subject lands must be vested in the liquidator before any sale can be effected. It is in order for the liquidator to facilitate a sale by the company in liquidation. Therefore there is no breach of s 233 of the Act;

(d) it was next submitted that the liquidator had failed to obtain the approval or sanction of the court as required under s 236(3). However we could not concur with this submission because it is apparent from s 236(2)(c) that the liquidator is at liberty to sell the subject lands without resort to court for leave (see *Abric Project Management & Anor v Palmshine Plaza Sdn Bhd & Anor* [2007] 5 MLJ 685 and *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749; [2010] 3 CLJ 785). It is the primary duty of the liquidator to realise the assets of the company in the best interests of the unsecured creditors. Accordingly this alleged contravention also fails. The case of *North Plaza Sdn Bhd v Equiticorp Holdings Ltd and other appeals* [2013] 3 MLJ 617; [2013] 3 CLJ 1101, which is a Federal Court decision, was cited in support of this submission. However, that case dealt with the purpose and significance of a COI where such a committee has been appointed. In such a case, the liquidator is bound to act in accordance with the directions and wishes of the COI. That is not the

case here. We have also explained that the appointment of a COI is not mandatory;

(e) significantly, the cited case is authority for the proposition that the exercise of the power of sale by a liquidator is always subject to the control of the court under s 236(3). However this cannot equated with a mandatory requirement that leave of court or sanction is necessary before a liquidator carries out his primary duty of realising assets, in this case the sale of the subject lands; and

(f) it was also submitted for the appellant that there was sufficient evidence before the court for it to infer that there was collusion between Tan Peng Son and the liquidator. Tan Peng Son is the majority shareholder and a director of the company as well as the purchaser, Steady Development.

[27] As set out above it is evident that on the date of the informal creditors' meeting on 1 October 2015, when the liquidator disclosed the quantum of all the bids to the creditors, it was Tan Peng Son who offered to purchase the subject lands at a price of RM1m higher than the highest bidder, Fujitrax Sdn Bhd.

[28] The suggestion is that this bid, which was accepted by the liquidator as it was the highest, is tainted because of:

(a) Tan Peng Son's common shareholding in the vendor and within the purchaser;

(b) the quantum of Tan Peng Son's bid falls far short of the market price prevailing;

(c) the failure of the liquidator to go back to Fujitrax to procure a higher bid despite stating that he would do so; and

(d) the valuation report from Ernest Cheong valuing the land at RM231m.

[29] We have given anxious consideration to this grave allegation but are constrained to conclude that there is simply insufficient evidence to bear out this allegation of collusion for the following reasons:

(a) we are cognisant of the position of Tan Peng Son as a majority shareholder in the company and as a director of the same;

(b) we also appreciate that as the majority shareholder and director of Steady Development, the purchaser, Tan Peng Son will be acquiring the most substantial and valuable asset of the company;

(c) however, the most important consideration to our minds that arises in determining whether there is any conflict or prejudice to the company or its unsecured creditors is whether there was sufficient disclosure of Tan

Peng Son's interests and whether the price at which the acquisition was made is a reflection of the fair market value. We are satisfied that this is the case because Tan Peng Son annexed to the bid under Steady Development a statutory declaration disclosing his interest prior to the informal creditors' meeting on 1 October 2015. This is what he said: 'I am a substantial shareholder of Steady Developments ... I am both a director and contributory of Wonderful Castle'. To our minds this afforded full and unqualified disclosure;

(d) we are also not aware of any authority prohibiting a contributory and a creditor from bidding in such a tender exercise provided there is full disclosure; and

(e) therefore, it cannot be said that the transaction was being undertaken at less than an arm's length basis.

[30] As for the sale price we are also satisfied that the sum of RM132m cannot be categorically stated to be an undervalue or far below the fair market price for the subject lands. This is because:

(a) an independent valuation undertaken by MacReal International Sdn Bhd ('MacReal') on 25 March 2015 at the behest of OCBC Bank valued the land at RM60m;

(b) it was not unreasonable for the liquidator to have utilised this report as a guide for the valuation of the land in September and October 2015;

(c) this was fortified by the second report by MacReal on 7 October 2015 where the valuation was again RM60m. As this valuation was undertaken by an independent party and an independent valuer, it is an objective assessment of the value of the land;

(d) Emiprima's letter of 28 September 2015 merely states that an adjacent land was sold at RM250,000 per acre. This amounts to approximately RM231m for the subject lands as a whole. However there are no other details or supporting documents to assist in supporting this assertion. Therefore not much weight may be given to this valuation;

(e) Ernest Cheong's valuation is RM210m but it was undertaken almost one year after the execution of the sale and purchase agreement in April 2016, at the behest of the appellant here. It is also pertinent to note, as mentioned earlier, that Ernest Cheong was the appellant's proxy at the creditor's meeting of the company on 31 March 2016. This valuation was also obtained shortly before the filing of the motion for the removal of the liquidator. To that extent, we are not satisfied that it is an entirely objective valuation; and

(f) taken in totality therefore, we are persuaded that the price at which the subject lands were transacted affords a reasonable price which is not far

short of the market value or an undervalue as asserted by the appellant. On the contrary looking at MacReal's objective and independent valuation, it appears to have been sold at well above the market value. The contention of a sale at an undervalue therefore fails.

[31] In conclusion, having painstakingly gone through the entirety of the grievances put forward by the appellant, we are satisfied that there is insufficient basis to warrant the removal of the liquidator. The appeal is therefore dismissed with costs.

[32] By way of postscript we have considered the post-sale events and are of the view that they are not directly relevant to the issues at hand.

Appeal dismissed.

Reported by Afiq Mohamad Noor